

CAPE COD COMMISSION

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Date: May 12, 1998

Applicant: Town of Sandwich - Zoning Board of Appeals
16 Jan Sebastian Drive
Sandwich, MA 02563

Project #: JD98017

Project: Nussbaumer Nursery & Landscaping Business
22 Popple Bottom Road
Sandwich, MA 02563

RE: Development of Regional Impact
Jurisdictional Determination
Cape Cod Commission Act, Section 12(j)

Book/Page: Book 157, Page 113

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby finds that the landscaping business and nursery proposed at 22 Popple Bottom Road in Sandwich, MA is not subject to mandatory review under Section 3(e) of the Development of Regional Impact (DRI) Enabling Regulations, Barnstable County Ordinance 90-12, as amended. Further, the project is not exempt under Section 22 of the Cape Cod Commission Act (Act). The decision is rendered pursuant to the vote of an authorized subcommittee of the Commission on May 7, 1998.

PROJECT DESCRIPTION

The proposed project consists of the operation of a landscaping business on an approximately 1/5 acre site of a 32.3 acre wooded lot in Sandwich. The project

includes the indoor commercial use of approximately 3,000 s.f. of gross floor area for office space and the storage of landscaping and farming equipment, supplies and inventory, and approximately 8,000 s.f. of outdoor commercial space for the transport and parking of wheeled motor vehicles and trailers. A one acre area has been cleared to accommodate a nursery directly adjacent to the proposed landscaping business. Potential future expansion of this nursery is proposed on a one acre area adjacent to the cleared area.

The site is situated directly north of, and adjacent to, Popple Bottom Road in Sandwich on property located generally to the east of Great Hill Road and west of the Sandwich/Barnstable town line. The site was formerly used as a junkyard, but is currently zoned residential and is adjacent to residential uses.

PROCEDURAL HISTORY

The Commission received a request for a Jurisdictional Determination (JD) from the Sandwich Zoning Board of Appeals on April 16, 1998. The Commission determined that the JD application was complete on April 23, 1998. A duly noticed public hearing pursuant to Section 5 of the Act to consider the request was held by an authorized subcommittee of the Commission on May 7, 1998 in the Sandwich Public Library, Sandwich, MA. The subcommittee consisted of Robert Deane (Chair), Tom Broidrick, Robert Randolph, Jay Schlaikjer, and Joseph Tamsky. The public hearing and record were closed on May 7, 1998. The subcommittee voted four in favor and one opposed that the project was not subject to mandatory review as a DRI.

MATERIALS SUBMITTED FOR THE RECORD

From the Applicant

- summary of background information prepared by Collette B. Sullivan, Sandwich Zoning Board of Appeals, dated April 28, 1998
- Jurisdictional Determination application dated April 15, 1998
- letter from Mr. Nussbaumer to the Sandwich Zoning Board of Appeals dated April 14, 1998
- letter from the Sandwich Planning Board dated April 6, 1998
- letter from the Sandwich Planning Board dated February 6, 1998
- letter of opinion from Elizabeth Lane of Kopelman and Paige, P.C. to Sandwich Zoning Board of Appeals dated October 28, 1997

From Mr. Nussbaumer (property owner)

- faxed lease agreement and marked-up scaled drawing dated May 5, 1998

- faxed property deeds and position letter dated April 22, 1998
- faxed contact information dated April 14, 1998.

From the Cape Cod Commission

- staff report dated May 1, 1998
- letter from Paul Sutton to Mr. Nussbaumer dated April 23, 1998
- letter from Paul Sutton to Mr. Nussbaumer dated April 17, 1998

The application and notices of public hearings relative thereto, the Commission's staff notes, exhibits and correspondence, the transcript and minutes of the hearing and all written submissions received in the course of our proceedings are incorporated into the record by reference.

TESTIMONY

At the May 7, 1998 public hearing, Commission project planner Paul Sutton presented the staff report, providing background information, a description of project and a summary of pertinent jurisdictional issues. He indicated that the project, as proposed, did not appear to trigger the DRI thresholds contained in Section 3(e) of the DRI Enabling Regulations, and thus did not appear to qualify for review as a DRI. Adding that the project was not exempt under Section 22(b) of the Cape Cod Act, he recommended that the Commission not claim mandatory jurisdiction over the proposed project. In response to public comment, Patty Daley, Commission Counsel, indicated that Commission and staff decisions need to be based on what is proposed in the JD application, as opposed to what is existing on site.

Comments from the public included those of Tara Drake and Linda Calmes. Ms. Drake stated that the existing one acre planting area did not constitute a nursery use, and that it should be viewed as part of the landscaping business. She also expressed concern over potential groundwater contamination issues related to site use. Ms. Calmes asked if the nursery operation was Mr. Fisher's or Mr. Nussbaumer's.

Comments from officials public were limited to those of Marie Buckner, Sandwich Director of Planning and Development, who explained the Town of Sandwich's process of reviewing Mr. Nussbaumer's variance request following a vote of the Commission.

Comments from the subcommittee included those of Tom Broidrick and Robert Randolph who inquired about Commission jurisdiction in the event that Mr. Nussbaumer deviated from his proposed plans by exceeding the 40,000 s.f. outdoor commercial space threshold. Joseph Tamsky said that there was insufficient commercial use to deem mandatory jurisdiction based on the information provided in

the JD application. Jay Schlaikjer disagreed that the Commission did not have mandatory jurisdiction to review the project as a DRI. He cited the general lack of information to substantiate the agricultural use of the nursery area.

The Commission voted four in favor and one opposed that the proposed project did not qualify for review as a DRI under Section 3(e) of the DRI Enabling Regulations.

FINDINGS

The Commission has considered the Town of Sandwich's request for a Jurisdictional Determination regarding the landscaping business and nursery proposed at 22 Popple Bottom Road in Sandwich, MA, and, based upon consideration of such request, and information presented at the public hearing and submitted for the record, makes the following findings under Sections 12 and 13 of the Act:

- 1.) No engineered drawings, only sketch plans, were submitted as part of this JD application. If the Commission finds the project differs in any way from the submitted sketch plans, the Commission may reconsider this Jurisdictional Determination. The project consists of the operation of a landscaping business on an approximately 1/5 acre site of a 32.3 acre wooded lot in Sandwich. The project includes the indoor commercial use of approximately 3,000 s.f. of gross floor area for office space and the storage of landscaping and farming equipment, supplies and inventory, and approximately 8,000 s.f. of outdoor commercial space for the transport and parking of wheeled motor vehicles and trailers. As present, approximately one acre of the adjacent land has been cleared. A sketch submitted by Mr. Nussbaumer indicates that an approximately 20,000 s.f. area of this cleared land has been planted.
- 2.) The proposed use could be classified as an agricultural use under case law relating to Section 3 of the Zoning Act, if five or more acres is cultivated. The Commission is not bound by the Zoning Act and relevant case law.
- 3.) The Commission finds that, because materials are proposed to be planted on-site, that portion of the site proposed for planting is an agricultural use as opposed to a commercial use. Therefore, the project does not propose more than 40,000 s.f. of outdoor commercial space.
- 4.) The project does not qualify as a DRI under Section 3(e) of the DRI Enabling Regulations, Barnstable County Ordinance 90-12 as amended which requires DRI review of "any . . . proposed commercial, service, retail or wholesale business, office or industrial development, as well as any private health, recreational or educational development [as follows]: . . . use changes which have a gross floor area greater than 10,000 s.f. . . . [and] new construction or use changes involving outdoor

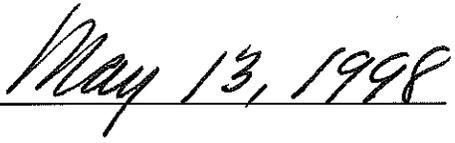
commercial space greater than 40,000 s.f."

5). The applicant has not obtained any permits which would qualify the project for an exemption under Section 22 of the Act.

CONCLUSION

Based on the findings above, the Commission hereby concludes that the landscaping business and nursery on 22 Popple Bottom Road in Sandwich, MA, as proposed in the Jurisdictional Determination application, is not subject to mandatory review under Section 3 of the DRI Enabling Regulations. Further, this project is not exempt under Section 22 of the Cape Cod Commission Act. This decision is rendered pursuant to a vote of an authorized subcommittee of the Commission on May 7, 1998.

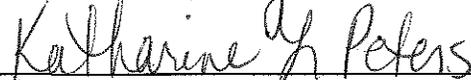

Robert Deane, Subcommittee Chair


Date

Commonwealth of Massachusetts

Barnstable, ss.

Subscribed and sworn before me this 13th day of May 1998


Name, Notary Public

My Commission expires:

